No. 16,292

United States Court of Appeals

For the Ninth Circuit

JACK PAUL BROWN,
Appellant,

vs.

DEAN KAYLER, CHRIS DAHL and JOHN DOE, d/b/a Kayler-Dahl Fish Company,
Appellees.

Upon Appeal from the District Court for the District of Alaska, First Division.

REPLY BRIEF OF APPELLANT.

ZIEGLER, ZIEGLER & CLOUDY,
P. O. Box 1079, Ketchikan, Alaska,
Proctors for Appellant.

Table of Authorities Cited

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Appellees, in their brief, pages 2 and 3, list reasons claimed to warrant dismissal of this appeal.

Paragraphs 1 and 4 under heading Grounds Warranting Dismissal, pages 2 and 3 of their brief, raises the question of the sufficiency of the specifications of error.

Brief of Appellant, page 3, states:

> "The case is now before this Court on Points 1 and 2 listed on page 38 of the Transcript which are to the effect that the Court erred in sustaining

the exceptions to the libel and in entering judgment dismissing the libel''

We take the position that the action of the lower Court in sustaining the exceptions to the second amended libel, and in entering judgment dismissing same, is in the nature of judgment on the pleadings.

> ''Where the Court has rendered judgment on the pleadings for either party, an assignment of error, stating generally that the Court erred in rendering judgment on the pleadings is sufficient''.
>
> *Klink et al. v. Chicago R. I. & P. Ry. Co.,* 219 Fed. Reporter, page 457.

Paragraph 2, page 3, appellees' brief, points out failure of appellant in his brief, to show jurisdiction in this Court as required by Rule 18, Subdivision 2 (b) (1). We adopt appellees' statement as to jurisdiction on page 2 of their brief, reading as follows:

> ''The jurisdiction of this Court rests on Secs. 1291 and 1294, Chapter 83, Title 28, United States Code, Judiciary and Judicial Procedure, and on the Act of July 7, 1958 (Public Law 85-508, 72 Stat. 348-349, Sections 12-14).''

Paragraph 3, page 3, appellees' brief, contends the brief of appellant contains no statement of the case as required by Rule 18, Subdivision 2 (c), unless the Preliminary Statement is so construed. We contend it should be so construed. It is conceded it would have been more appropriate to have entitled the Preliminary Statement as ''Statement of the Case''.

It is true and we concede that failure to comply with the Rules of this Court creates ground for dismissal of the appeal. However, the Rules are not strictly enforced, especially where in a case of this simple nature, there is but one error claimed.

In most if not all the cases cited in paragraph 4, page 3 of appellees' brief, decided by this Court, the appeals were not disposed of on account of failure of appellant to comply with the rules with respect to specifications of error.

This case is before the Court on the simple issue of whether or not the facts pleaded in the Second Amended Libel were sufficient to show excusable delay on the part of appellant and no prejudice to appellees arising out of that delay.

We would not have filed a Reply Brief, had not appellees in their brief, pages 2 and 3, for the reasons stated, urged dismissal of the appeal, because we feel that the parties have clearly stated their positions with respect to the facts and law involved in this appeal.

CONCLUSION.

Suit on this claim was commenced within the two year Alaska Statute.

For the reasons set forth in the Second Amended Libel that suit was dismissed.

As a result, if appellant was to have a day in Court, suit in Admiralty became the only remedy.

Such suit was promptly instituted.

If ownership of the assets of the dissolved corporation was merely changed from a corporate to an individual status, there could be no intervening interest or rights affected by the delay.

The facts pleaded, if established on a trial, would defeat the presumption of prejudice, and excuse the delay, or rather justify the necessity for proceeding in admiralty.

Appellant has assumed the burden of proving no inexcusable delay, and without a trial on the merits, as many cases hold, will not have the right or opportunity to do so.

Dated, Ketchikan, Alaska,
August 3, 1959.

Respectfully submitted,
ZIEGLER, ZIEGLER & CLOUDY,
By A. H. ZIEGLER,
Proctors for Appellant.